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No. 71-617

In the Supreme Court of the United States

OCTOBER TERM, 1971

ELISHA COMBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,

HENRY E. PETERSEN,
Assistant Attorney General,

WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General,

BEATRICE ROSENBERG,
ROBERT A. PARKER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-517

ELISHA COMBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 446 F. 2d 515.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1971. A petition for rehearing was denied on September 15, 1971. The petition for a writ of certiorari was filed on October 9, 1971; it was granted on January 10, 1972 (App. 33). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether one charged with possession of stolen property should, by virtue of that fact alone, be accorded automatic standing to challenge a search for or seizure of that property.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted under an indictment charging him with having received, possessed and concealed twenty-six cases of taxpaid whiskey stolen from an interstate shipment, knowing them to have been stolen, in violation of 18 U.S.C. 659.[1] On October 1, 1970, he was sentenced to two years' imprisonment

[1] Petitioner's father, a co-defendant, was convicted but did not appeal; petitioner's brother was acquitted on a related charge.

and fined $5,000. The court of appeals affirmed *per curiam* (Pet. App. A).

1. The government's evidence at trial showed that, on July 28, 1969, petitioner telephoned one Janet Ballard and asked whether she knew of anyone who wanted to buy some whiskey. Mrs. Ballard said that she did, and later that day petitioner delivered approximately forty cases of whiskey to the home of Mrs. Ballard in Newport, Kentucky (Tr. 2-5).[2]

The following evening, Mrs. Ballard telephoned petitioner and told him to remove the whiskey since she had heard that it was stolen (Tr. 7).[3] Petitioner and one James Martin, Mrs. Ballard's brother, then moved the whiskey to the basement of the home of petitioner's estranged wife, where an additional thirty or forty cases of whiskey were already stored (Tr. 38-40). Later that same week, Martin received a telephone call from petitioner; he was told that "the heat was on" and that the whiskey would again have to be moved (Tr. 40, 60-63). He and petitioner then went to the house where the whiskey was stored, loaded all the cases onto a pick-up truck, and transported the whiskey to Hazard, Kentucky; the cases were placed in an old shed on the property of petitioner's father (Tr. 40-43, 132).

Thereafter, Martin went to the F.B.I. agent assigned to the area and told him of the stolen whiskey.

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[2] "Tr." references are to the transcript of trial proceedings in the district court, a copy of which is on file with the Clerk of this Court.

[3] In the interim, Mrs. Ballard had sold ten cases and had given petitioner the money (Tr. 5, 7).

(Tr. 45, 51, 112). The agent gave the information to the Kentucky state police; they obtained and executed a warrant to search the father's farm. Pursuant thereto, the police seized the twenty-six cases of stolen whiskey involved here (Tr. 100-106). Petitioner, who was not present at the time of the seizure, was later arrested at his home in Newport (Tr. 119-120).

2. Petitioner took the stand at his trial and disclaimed any interest in the whiskey (Tr. 172-173, 179, 194). Other defense witnesses, all of whom were members of petitioner's family, testified that the whiskey had been placed in the shed by Martin and one Chapman, who were alleged to have earlier rented the shed from petitioner's mother (Tr. 105, 130, 198, 215, 224-225).[4] Martin denied that he had rented the shed, and also that Chapman had been involved in transporting the whiskey (Tr. 68-70).

3. Prior to trial, petitioner and his co-defendant moved to suppress the whiskey on the ground that the search warrant had not been supported by probable cause. Following a hearing which did not focus on the question of standing, the district judge denied the motion, finding that the affidavit for the search warrant was legally sufficient. On appeal, the government did not rely on the sufficiency of the affi-

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[4] At the time of the search, petitioner's mother produced an undated receipt indicating that the shed had been rented to Martin and Chapman for storage purposes for three months (Tr. 105). At trial, she testified that she had rented the shed to Martin on July 31 or August 1, 1969 (Tr. 197-199).

davit,[5] but asserted that petitioner had no standing to raise a Fourth Amendment claim since he was not on the property at the time of the search and claimed no interest in the seized whiskey. The court of appeals (Pet. App. A) held that petitioner was without standing to challenge the search, and accordingly affirmed the conviction. It denied a petition for rehearing (Pet. App. B).

SUMMARY OF ARGUMENT

I

In *Jones* v. *United States*, 362 U.S. 257, this Court held, *inter alia*, that one charged with a possessory crime would, by virtue of that charge alone, be accorded standing to move to suppress evidence allegedly obtained by an illegal search or seizure. This automatic standing rule merits reexamination in light of subsequent decisions by this Court that undercut some of the reasoning sustaining it. The present case provides an appropriate occasion to consider whether, as to one whose Fourth Amendment claim is grounded on the unlawful seizure of stolen goods, an application of the automatic standing rule either furthers

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[5] The affidavit for the search warrant was, as we conceded in response to the petition for a writ of certiorari, clearly insufficient. It stated in pertinent part that the affiant has "reasonable grounds from information from an informant that this whiskey was transported to the above described premises." This Court has held that such conclusory allegations do not provide the magistrate or judge with enough facts from which to assess the accuracy of the matters asserted. *Aguilar* v. *Texas*, 378 U.S. 108.

the overriding purpose of the Fourth Amendment, or is required under the dual rationale set forth in *Jones*. On both aspects of the question, our response is no.

II

The fundamental purpose of the Fourth Amendment is to protect individual privacy. See *Katz* v. *United States*, 389 U.S. 347. It is this concept, rather than the nature of the criminal charge, that we believe should be controlling on the question of standing to move to suppress. The essential inquiry is whether the accused "himself was the victim of an invasion of privacy" (*Alderman* v. *United States*, 394 U.S. 165, 173), that is, whether the challenged search or seizure intruded upon his own "person," "papers," or "effects," or invaded premises in which he had a sufficient Fourth Amendment interest.

It is our position that, to satisfy the constitutional standard, it is not enough for the accused to point only to a seizure from remote premises of stolen property with respect to which he had constructive possession. As to such property, it can reasonably be expected that efforts will be made by the authorities to apprehend the stolen goods and return them to the rightful owner. (Compare *Mancusi* v. *DeForte*, 392 U.S. 364, 368.) They thus carry with them no legitimate expectation of privacy in the hands of a wrongful possessor. Certainly, the values sought to be protected by the Fourth Amendment are not "served by holding that a thief who has left evidence of his crime on the premises of a confeder-

ate is subrogated to the latter's right to complain of a search and seizure * * *" (*United States* v. *Bozza*, 365 F.2d 206, 223 (C.A. 2)).

Nor do we think that the dual rationale of *Jones* requires a different result because the underlying criminal charge in this case includes "possession" as an element of the offense. No longer does a defendant need to worry that to vindicate his Fourth Amendment rights on a motion to suppress he might have virtually to admit his guilt of the offense charged. Such a "dilemma," which partially sustained the automatic standing rule of *Jones*, has essentially been eliminated by this Court's subsequent decision in *Simmons* v. *United States*, 390 U.S. 377, precluding the prosecution's use against a defendant at trial of testimony offered to establish his standing on a suppression motion. While *Simmons* arose in the context of a prosecution for a non-possessory offense, we think that the use-restriction rule enunciated therein has equal application with respect to the possessory charge involved here.

This leaves only the question whether, by not conferring automatic standing in the present case, the government is, as the Court stated in *Jones*, permitted "to have the advantage of contradictory positions as a basis for conviction" (362 U.S. at 263). We do not think so. Proof of petitioner's knowing possession of the stolen whiskey is essential to the government's case in chief; but the government need not refute possession in order to succeed on the question of standing under the Fourth Amendment. Since pe-

titioner's possession was wrongful, it does not alone provide a basis for a constitutional claim of invasion of individual privacy. Instead, to sustain his standing, petitioner must show some intrusion upon the privacy of his own person, papers or effects, or upon private premises in which he has a sufficient Fourth Amendment interest. There is no inconsistency in the government's asserting before the jury on the issue of guilt that the petitioner had possession of the stolen whiskey, while requiring the petitioner, on a motion to suppress, to demonstrate that some legitimate expectation of privacy on his part was invaded by the search and seizure.

III

There has been no testimony in this case on the issue of standing before the district court, because the district judge ruled on the merits that the affidavit for the search warrant pursuant to which the stolen whiskey was seized was invalid. In view of the government's concession to the contrary (both in the court below and here), it seems appropriate that the instant case be remanded to the district court for a determination of the question whether petitioner was a victim of an invasion of privacy with respect to the seizure of the stolen whiskey.

ARGUMENT

I. Introduction

"The problem of standing in Fourth Amendment cases has for a considerable period of years been trou-

blesome to courts and commentators." *United States* v. *West*, C.A. 3, No. 71-1687, decided January 21, 1972, slip op. at pp. 3-4. The issue is not only, as pointed out by the Third Circuit in *West* (slip op. at p. 4 n. 4a), "inextricably bound to the philosophical underpinning of the application of the exclusionary rule as a means of enforcing the Fourth Amendment"; it is also as firmly riveted to the underlying philosophy of the Fourth Amendment itself. In the context of the present case, the question of standing is a difficult one. To dispose of it summarily by an uncritical reference to this Court's decision in *Jones* v. *United States*, 362 U.S. 257, as petitioner has done, fails to come to grips with the conceptual problems that flow from an indiscriminate application of *Jones* in the present circumstances.

Since filing our Memorandum in Opposition to the petition for a writ of certiorari, we have had an opportunity to reconsider fully the question of standing in relation to the Fourth Amendment. We now are of the view that this is a proper occasion to ask this Court to modify the standing rule that it laid down in *Jones* and reiterated to some extent in *Simmons* v. *United States*, 390 U.S. 377. It is our position that, in view of the essential purpose of the Fourth Amendment to protect individual privacy (*Katz* v. *United States*, 389 U.S. 347, 351), a person who is charged with possession of stolen property can have no reasonable expectation of privacy with respect to that property; he therefore ought not to be ac-

corded standing, by virtue of the "possessory" charge alone, to challenge the validity of the search and seizure. He should, instead, be permitted to assert such a challenge only if the search and seizure takes place under circumstances otherwise amounting to an invasion of his legitimate expectation of privacy.

II. Since One In Possession of Stolen Property Has No Reasonable Expectation of Privacy Therein, the Charge of Possession of Such Property Should Not Alone Confer Standing To Move To Suppress

A. *The Bifurcated Holding in* Jones

Any consideration of standing on a motion to suppress must start with the fundamental question of the nature of the right protected by the Fourth Amendment. In *Katz* v. *United States*, 389 U.S. 347, 351, this Court recently spoke directly to that point:

> * * * the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. * * *

1. *The defendant's presence.* Viewing Fourth Amendment interests in that perspective, we think that there can be little dispute with this Court's finding in *Jones*, *supra*, 362 U.S. at 265-267, that lower courts had theretofore adopted too narrow a view of the interest in searched premises for purposes of con-

ferring standing to maintain a suppression motion.* We therefore do not question the essential soundness of the *Jones* ruling that (362 U.S. at 267):

> [A]nyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. * * *

This case, however, in its present posture, does not involve that aspect of the *Jones* decision (but see pp. 40-41, *infra*). The search here did not take place on petitioner's premises, but on the premises of his father (Tr. 40-43). At the time that occurred, petitioner was neither living with, nor visiting, his parents. He was not present when the stolen whiskey was seized, nor was he near the shed where it was stored. Indeed, the shed was said to be leased at the time to two men unrelated to petitioner (Tr. 198, 215, 224), one of whom, James Martin, had been the informant who directed F.B.I. agents to the stolen property.

2. *The possessory offense.* In such circumstances, petitioner's claim of standing to raise a Fourth Amendment objection must rest on this Court's sep-

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* In *Jones*, narcotics were found pursuant to the execution of a search warrant directed to an apartment in which petitioner had no interest greater than an invitee or guest. The two lower courts, following what then seemed to be the prevailing authority in the courts of appeals, held that, since the defendant had no property interest in the premises, he lacked standing to challenge the validity of the search warrant.

arate ground for its decision in *Jones*, *i.e.*, that the return of an indictment charging him with a "possessory" crime is itself enough to confer standing to challenge the validity of a search for and seizure of the thing illegally possessed (362 U.S. at 263-264). When considered in light of subsequent decisions of this Court, the dual rationale sustaining that proposition has little application to the precise situation presented here, and neither the overriding purpose of the Fourth Amendment, nor the "philosophical underpinning" of the exclusionary rule (*United States* v. *West*, *supra*, slip op. at p. 4 n. 4a), are, we submit, furthered by an application of an automatic standing rule in the circumstances of this case.

a. In *Jones*, the defendant was charged with narcotics offenses (21 U.S.C. (1964 ed.) 174, 26 U.S.C. (1964 ed.) 4704(a)) which, because of statutory presumptions, permitted conviction upon proof of knowing possession alone.[7] Observing that such prosecutions "have presented a special problem" (362 U.S. at 261) for defendants with Fourth Amendment claims, the Court explained (362 U.S. at 261-262) that "a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him." In the words of Mr. Justice Frankfurter, speaking for the Court (362 U.S. at 262):

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[7] While *Jones* involved contraband property, whereas the present case is concerned with stolen property, we do not perceive any basis for distinction on that ground.

> At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession.

It was this "dilemma" (362 U.S. at 262) which in part prompted the enunciation in *Jones* of an automatic standing rule in cases involving possessory crimes.

But the "dilemma" rationale was not alone advanced as ground for ruling that a criminal charge of possession in itself confers standing under the Fourth Amendment. The Court also stated (362 U.S. at 263): "* * * we are persuaded by this consideration: to hold to the contrary, that is, to hold that [the defendant's] failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction." Expanding on this alternative "inconsistent government positions" rationale, the Court reasoned (362 U.S. at 263-264):

> [The defendant's] conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that [defendant] did not have pos-

> session of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. The possession on the basis of which [defendant] is to be and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41(e) [Fed.R.Crim. P.].[8]

b. Many of the decisions in the lower courts since *Jones* seem to us to have applied its automatic standing rule mechanically without considering either the dual rationale of the *Jones* decision or the fundamental purpose of the Fourth Amendment. Attention has often focused on a matter which we do not consider germane to Fourth Amendment issues, *i.e.*, whether possession was or was not an element of the offenses charged.[9]

The crimes with which the defendant was charged

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[8] Rule 41(e), Fed. R. Crim. P. is "a statutory direction governing the suppression of evidence acquired in violation of the conditions validating a search" (*Jones* v. *United States*, *supra*, 362 U.S. at 260). As this Court pointed out in *Alderman* v. *United States*, 394 U.S. 165, 173 n. 6: "*Jones* thus makes clear that Rule 41 conforms to the general standard and is no broader than the constitutional rule."

[9] In our Memorandum in Opposition to the certiorari petition (pp. 4-5), we intimated that this consideration might be relevant to the standing question. But, for the reasons set forth *infra*, further reflection has persuaded us that it should have no bearing on the issue now before this Court.

in *Jones* were unusual in that possession of the property seized was not merely an element of the offense —as is the case here, for example (18 U.S.C. 659)— but was alone sufficient for conviction. Shortly after *Jones*, two courts of appeals reached opposite conclusions as to the applicability of the automatic standing holding in *Jones* with respect to a person charged with possession of goods stolen from an interstate shipment (18 U.S.C. 659). In *United States* v. *Konigsberg*, 336 F. 2d 844, 847 (C.A. 3), certiorari denied, 379 U.S. 933, the Third Circuit, as an alternative basis for its denial of standing to the defendant, interpreted *Jones* as limited to the situation where "possession" was alone sufficient to convict. Thereafter, the First Circuit, taking explicit notice of *Konigsberg*, disagreed; in *Niro* v. *United States*, 388 F. 2d 535, 537 (C.A. 1), it held that the *Jones* rule was applicable even though possession was only one element of the offense charged. See also *Simpson* v. *United States*, 346 F. 2d 291, 295 (C.A. 10).

This conflict was for most courts of appeals later deemed settled by the considered dicta of this Court in *Simmons* v. *United States*, 390 U.S. 377. That case involved a conviction of two defendants, Simmons and Garrett, for the armed robbery of a federally insured savings and loan association (18 U.S.C. 2113), a non-possessory offense. The question pertinent to this case which the Court decided was not one of "standing," but whether the government had been properly permitted at trial to introduce against Garrett on the issue of guilt the testimony previously given by him upon his unsuccessful motion to suppress

evidence on grounds of illegal search and seizure. While we will turn shortly to the Court's treatment of that issue (see *infra*, pp. 34-38), since we think it bears on the "dilemma" rationale advanced in *Jones*, it is enough here to point out what was said in *Simmons* with respect to the automatic standing rule. Summarizing the possessory aspect of its earlier decision in *Jones*, the Court stated (390 U.S. at 390): "* * * we held that when, as in *Jones*, possession of the seized evidence is itself *an essential element of the offense* with which the defendant is charged, the government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence" (emphasis added).

Based in large part on this statement, a number of courts of appeals which have since had occasion to consider the issue that had previously divided the Third and First Circuits[10] have uniformly aligned themselves with the First Circuit's decision in *Niro*—*i.e.*, that the *Jones* rule of automatic standing applies to all types of possessory offenses—and have specifically disapproved the holding in *Konigsberg*. See, *e.g.*, *United States* v. *Price*, 447 F. 2d 23, 28-29 (C.A. 2); *United States* v. *Cobb*, 432 F. 2d 716, 719-722 (C.A. 4); *Glisson* v. *United States*, 406 F. 2d 423, 425-426 (C.A. 5); *United States* v. *Allsenberrie*, 424 F. 2d 1209, 1213-1214 (C.A. 7). See also *Baker* v. *United States*, 401 F. 2d 958, 982 (C.A.D.C.) (dictum); *Kuhl* v. *United States*, 370 F. 2d 20, 34-36 (C.A. 9)

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[10] In *United States* v. *West*, *supra*, the Third Circuit in effect abandoned its *Konigsberg* ruling.

(*en banc;* opinion of four judges dissenting).[11] The same conclusion was reached by the Sixth Circuit (which decided the instant case) in *Colosimo* v. *Perini*, 415 F. 2d 804 (C.A. 6).

c. It is our view, however, that the fact that possession is an "element of the offense" should not alone accord an accused standing to challenge the lawfulness of a search and seizure. Not infrequently, that consideration seems to us to have little relevancy to the dual rationale sustaining the standing rule in *Jones*, *i.e.*, the dilemma of the defendant, on the one hand, and inconsistent government positions, on the other.

If, for example, an unlawful search occurs sometime after the defendant has parted with possession of the property seized, at a place in which the defendant has no interest and at a time when he is not present, we see no reason why the fact that he is charged with being in possession of that property at some earlier time should preclude the government from challenging his standing to raise a Fourth Amendment claim. With respect to the search and seizure, he is essentially in no different position from that of any stranger asserting a right to suppress, and thus he should be required to show some basis for claiming an invasion of privacy.[12] Nor do we

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[11] The majority did not reach the issue.

[12] If, contrary to the position we urge *infra*, the automatic standing rule were applied whenever "possession" is alleged to be contemporaneous with the search and seizure, it might be argued that to create a different rule for circumstances in which the seizure occurs after possession terminates would place an accused in the *Jones* "dilemma" by forcing him to

think that this would place the government in a posture which requires the assertion of "inconsistent * * * positions." There surely is nothing contradictory about arguing, on the one hand, that the defendant had no interest in either property or premises at the time of the search and seizure, and contending, on the other hand, that he was in possession of the seized property at some earlier time for purposes of proving the offense charged.

d. We therefore do not think it necessarily follows from the fact that the government charges possession as an element of the crime that the rationale of *Jones* concerning possession warrants an application of the automatic standing rule for Fourth Amendment purposes.[18] To urge otherwise without any analysis of

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assert contemporaneous possession. But, as we suggest below, the use-restriction rule laid down in *Simmons* can be applied to extricate a defendant from such a dilemma.

[18] We think it is not inappropriate to read *Wong Sun* v. *United States*, 371 U.S. 471, as supporting this conclusion. In that case, two defendants, Wong Sun and Toy, were convicted of having knowingly transported and concealed illegally imported heroin, in violation of 21 U.S.C. (1964 ed.) 174, one of the statutes involved in *Jones*. The narcotics had been obtained by federal agents from one Yee, whom the agents had learned of through a statement unlawfully elicted from Toy. When Yee surrendered the drugs, he implicated Wong Sun. As to Toy, the Court held that the narcotics should have been excluded as the product of the statement illegally elicited from him by the agent. But, with respect to Wong Sun, the Court sustained the introduction of the narcotics, finding no invasion of Wong Sun's privacy. Noting that Wong Sun, unlike the defendant in *Jones*, was not "lawfully on [Yee's] premises at the time of the search" (371 U.S. at 492 n. 18), the Court held (371 U.S. at 492): "The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." Apparently little

competing considerations, as petitioner has done here, not only ignores certain pronouncements of this Court since *Jones* that undercut some of its reasoning, but also overlooks what we view as fundamental to any inquiry under the Fourth Amendment, *i.e.*, whether at the time of the search and seizure there was any invasion of this defendant's legitimate expectation of privacy.[14] To be sure, the instant case does not present the standing issue in the precise context hypothesized above;[15] here the wrongful possession with

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significance was attached to the fact that possession was an element of the offense with which Wong Sun was charged. Although no explanation was given in the opinion, it seems to us likely that the Court recognized that, notwithstanding the possessory charge, an application of the automatic standing rule of *Jones* made little sense in the circumstances, since Wong Sun had plainly parted with possession of the heroin at the time that it was seized from Yee.

If our reading of *Wong Sun* is correct, the case represents what we believe to be a reasonable limitation on the automatic standing rule of *Jones*. It is, moreover, fully consistent with the result we urge here—*i.e.*, that the question of standing to suppress evidence, when it relates to a defendant charged with a possessory crime, should turn, not simply on the nature of the charge, but on whether the challenged search and seizure invaded a legitimate expectation of the defendant's privacy. Compare *United States* v. *Lopez*, 420 F. 2d 313 (C.A. 2), involving a non-possessory offense, where the court in dictum indicated that *Jones* should be read in light of *Wong Sun* (420 F. 2d at 316-317).

[14] If this question can be answered affirmatively, the reasonableness of that invasion is, of course, a matter that goes to the merits of the motion to suppress, rather than to the question of standing to raise the motion.

[15] The standing issue is now before the Court in that context in *Brown and Smith* v. *United States*, pending on petition for

which petitioner was charged coincided with the seizure of the property, rather than occurring only at some earlier point in time.[16] But, because that property was stolen goods, it is our position that petitioner should not be entitled to standing simply because the government charged him with a possessory crime.

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a writ of certiorari, No. 71-6193, this Term. We are urging the Court to defer action in that case until the instant case has been decided. In *Brown and Smith*, the Sixth Circuit held that defendants were without standing to raise a Fourth Amendment claim. A recent decision by the Second Circuit, *United States* v. *Price*, 447 F. 2d 23 (C.A. 2), also involving a motion to suppress by a defendant charged with a possessory crime, reached the opposite result. There the court applied the automatic standing rule of *Jones* despite the fact that the defendant had relinquished all control over the goods in question well before the time of the challenged search and seizure. Since *Price* involved stolen property, it will, of course, have little vitality if this Court agrees with our position in the instant case. Should the Court disagree with us here, however, the conflict between *Brown and Smith* and *Price* with respect to the question of standing in that separate context might well remain unresolved.

[16] In its original opinion in this case, the court below seemingly did not realize that petitioner had been charged, among other things, with *possession* of the stolen property. It described the indictment and conviction as involving only "receiving and concealing taxpaid whiskey stolen from an interstate shipment" (446 F. 2d 515). In a petition for rehearing, petitioner expressly called the attention of the court of appeals to the fact that he had been charged with possession and invoked the automatic standing rule in *Jones*. The court responded by denying the rehearing petition (Pet. App. B) with a citation to *Wong Sun*, *supra*, and to the Second Circuit decision in *United States* v. *Lopez*, *supra*.

B. *The Case Against the Automatic Standing Rule*

We come, then, to what we deem to be the crucial inquiry presented here, *i.e.*, whether it is consonant with the underlying philosophy of the Fourth Amendment to accord automatic standing under *Jones* to persons charged with knowing possession of stolen property. We think not.

1. *The protected right of privacy.* As pointed out earlier, the essential purpose of the Fourth Amendment is to protect privacy. See *Katz* v. *United States*, 389 U.S. 347. Thus, this Court has long held that only persons injured in their privacy by a search and seizure have standing to challenge its validity. The Court's basic doctrine in the "standing" field—which we do not challenge—was most recently expressed in *Alderman* v. *United States*, *supra*, 394 U.S. at 173, where the Court, quoting from *Jones* (362 U.S. at 261), stated:

> * * * "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else * * *."
>
> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

The same concept, that a person must have been "the victim of an invasion of privacy" in order to have "standing" under the Fourth Amendment, was set forth in *Mancusi* v. *DeForte*, 392 U.S. 364. That case involved a seizure without a warrant of union records from an office shared by DeForte with union officers while DeForte was present and had custody of the records, and over his protest. The Court stated (392 U.S. at 367-368; footnote omitted):

> We deal, first, with the question of "standing." * * * It was settled even before our decision in *Jones* * * * that one with a possessory interest in the premises might have standing. See, *e.g.*, *United States* v. *Jeffers*, 342 U.S. 48. In *Jones*, even that requirement was loosened, and we held that "anyone legitimately on premises where a search occurs may challenge its legality * * * when its fruits are proposed to be used against him." 362 U.S. at 267. The Court's recent decision in *Katz* v. *United States*, 389 U.S. 347, makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. * * *

The Court held that DeForte's office was a place in which he "could reasonably have expected that only those persons [other union officials with whom he shared the office] and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups" (392 U.S. at 369).

2. *Possession of stolen goods.* We have no disagreement with the general test of "standing" to suppress that a person be the "victim of an invasion of privacy" (*Alderman* v. *United States*, *supra*, 394 U.S. at 173). Nor do we doubt, given the Fourth Amendment's protection of "papers and effects", that one has standing to challenge a search directed at his lawfully owned property, even in the absence of any intrusion on his person or on premises in which he has a sufficient interest. We do urge however, that a person who possesses stolen property cannot be said to have a "reasonable expectation of freedom from governmental intrusion" (*Mancusi* v. *DeForte*, *supra*, 392 U.S. at 368) with respect to that property such as to make him the "victim" of a search or seizure for "standing" purposes when the seizure of the property occurs, as may be true here, in an area where he otherwise has no legitimate expectation of privacy.[17]

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[17] There may be some question whether one who claims that he innocently possessed the stolen property, not knowing it to be stolen, can be deemed to be a "victim" of a search and seizure for standing purposes. Since it is still stolen property, he plainly is in no better position to assert an actual possessory interest in such property as his personal "effects" under the Fourth Amendment. But, perhaps it could be argued that, because he had no reason to know that the property was stolen, he should be deemed to have had a legitimate expectation of privacy therein for standing purposes.

The question does not seem to be presented in this case, since petitioner has been convicted of knowing possession, and his defense at trial was that he did not possess the whiskey at all (Tr. 172-173, 179, 194). Moreover, even if he were now to assert innocent possession—assuming *arguendo* that

Indeed, the Second Circuit recently so held in *United States* v. *Sacco*, 436 F. 2d 780 (C.A. 2), involving a charge of conspiracy to transport in interstate commerce stolen goods (T.V. sets), knowing them to have been stolen. Sacco had stored the television sets in the basement of premises owned by another; they had been found there by the police pursuant to the execution of a search warrant for the premises. In denying Sacco standing to move to suppress the stolen property on the ground that the affidavit on the basis of which the search warrant had been issued was insufficient, the court of appeals pointed out that he had no legitimate expectation of privacy with respect to the premises searched and had not been present at the time of the seizure (436 F. 2d at 784). "His claim," it stated (*ibid.*), "amounts to the contention that he had a sufficient possessory interest in the stolen goods to entitle him to object to their seizure." This argument was flatly rejected on the authority of *United States* v. *Lopez*, *supra*, and *United States* v. *Bozza*, 365 F. 2d 206 (C.A. 2). As Judge Friendly pointed out in the *Bozza* case, the values sought to be protected by the Fourth Amendment are not "served by holding that a thief who has left evidence of his crime on the premises of a confederate is subrogated

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he would have standing to raise such a claim under the Fourth Amendment—that would not alter our position here. Petitioner still should not be accorded automatic standing under *Jones*, but, for the reasons stated herein, should be required to come forward and establish his "standing" at the suppression hearing by satisfactorily demonstrating his lack of knowledge that the property was stolen. See n. 27, *infra*.

to the latter's right to complain of a search and seizure * * *" (365 F.2d at 223). And see *Palmer* v. *State of Maryland*, Md. Ct. of Spec. App., No. 250, decided January 27, 1972, 286 A.2d 572.[18]

Nor should it be relevant for Fourth Amendment purposes that the defendant in *Sacco* had been charged with a non-possessory crime. If he did not have a sufficient Fourth Amendment interest in the stolen property at the time of the search to afford him standing under the conspiracy charge, we fail to see how, as a matter of constitutional law, he is in a position to assert any greater Fourth Amendment interest under some other charge.

In *United States* v. *Jones*, *supra*, this Court noted that those whose presence on the searched premises is "wrongful" cannot invoke the privacy of the premises (362 U.S. at 267). See also *United States* v. *Cole*, 416 F.2d 827 (C.A. 6), certiorari denied, 397 U.S. 1027 (trespasser has no standing). By the same reasoning, we think that those whose possession of per-

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[18] In *Palmer*, the Maryland court considered the question of standing of a thief to challenge the search of a stolen automobile in which he was riding at the time of apprehension. In a learned opinion, the court denied standing, stating (286 A.2d at 578): "Both the overwhelming weight of authority and, we feel, the better reasoning are represented by the cases which hold squarely that the thief has no 'standing' in the stolen automobile * * *. Even more compelling than the precedents from our sister jurisdictions, however, is the inherent logic of the proposition. No valuable social purpose could conceivably be served by extending the protection of the Fourth Amendment to a thief in the enjoyment of the stolen automobile" (footnote omitted).

sonal property is "wrongful," because it is stolen merchandise, should not be permitted to claim a legitimate Fourth Amendment interest in that property. Otherwise, a trespasser who has hidden stolen goods on a stranger's premises would, by virtue of his claimed interest in the hidden property alone, be on an equal footing for purposes or standing under the Fourth Amendment with one "legitimately on premises where a search occur[red]" (*Jones*, *supra*, 362 U.S. at 267). Mere possession alone, if "wrongful," should no more serve as a basis for asserting an invasion of privacy than does mere presence alone, when it is "wrongful." [19]

In this regard, it is relevant to point out that, prior to this Court's formulation of the exclusionary rule (see, *e.g.*, *Boyd* v. *United States*, 116 U.S. 616; *Weeks* v. *United States*, 232 U.S. 383), the typical

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[19] This Court in a related context has indicated that, under the Fourth Amendment's flexible standard of reasonableness (see *Camara* v. *Municipal Court*, 387 U.S. 523, 534-539), searches for and seizures of stolen goods, where the government is entitled to recover the property, may require less justification than where the property seized is the person's own personal effects. See *Davis* v. *United States*, 328 U.S. 582, 590-591, 593; *Boyd* v. *United States*, 116 U.S. 616, 623-624. This, we think, connotes an implicit recognition that no substantial right of privacy should attach to the possessor of articles merely by virtue of his "wrongful" possession. Thus, the rule with respect to the quantum of reasonableness needed to justify a search or seizure of stolen property where "standing" is independently established is consistent with our position that an individual cannot, by virtue solely of his knowing, wrongful possession of stolen articles, claim standing to challenge the search or seizure of that property.

means of asserting a claim of invasion of privacy due to an interference with property rights by law enforcement officers was by way of a common law action of trespass or conversion for damages or return of the property. See, *e.g.*, *Entick* v. *Carrington*, 19 Howell St. Tr. 1029 (trespass action); *Banks* v. *Farwell*, 21 Pick. 156 (Mass.) (same); *Oviatt* v. *Pond*, 29 Conn. 479 (Sup. Ct. of Errors, New Haven Cty.) (conversion action).[20] But recovery in such suits was premised on a showing by the plaintiff that he was, at the time of the wrongful intrusion, not only in possession of the property seized or injured, but also that he had some colorable claim of right to it. "No court ever has allowed an admitted, or even a clearly proved, thief without a claim of right to recover * * *." Prosser, *Torts* (3d ed.) 95; and see *id.* at 78 n. 55. Surely, one in possession of stolen property should be in no different position under the exclusionary rule to assert a claim of invasion of privacy with respect to the seizure of that property than he is in an action to recover damages grounded on the same claim. Compare *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388.

3. *United States* v. *Jeffers and the exclusionary rule.* This, of course, does not mean that, whenever stolen property is searched for or seized, the possessor thereof has no standing to complain; our position is

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[20] At common law the admissibility of the evidence was not affected by the illegality of the means by which it was obtained. See *Adams* v. *New York*, 192 U.S. 585, 594-595; and see VIII Wigmore, *Evidence* (McNaughton rev. 1961) § 2183.

simply that the "standing" of such a person in terms of the Fourth Amendment must depend on some invasion of his right of privacy other than that deemed to arise from his wrongful possession alone. Thus, if the search or seizure takes place in his home or office, for example, or on the premises of another where he is and has a right to be, he would have standing. Similarly, if his person were searched he would have standing. But the thief who secretes property he has stolen in an open field, or on someone else's premises without permission, has, we submit, suffered no infringement of any legitimate expectation of privacy at the time that the property is seized and should not be heard to complain.

a. We recognize that there is language in *United States* v. *Jeffers*, 342 U.S. 48, that seems to point the other way, but we do not read that decision as being inconsistent on its facts with the result we urge here. In *Jeffers*, the defendant, who was charged with narcotics offenses (see n. 7, *supra*), moved to suppress quantities of cocaine seized without a search warrant from a hotel room leased to his two aunts. At the pretrial hearing, it was established that the aunts "had given [defendant] a key to their room, that he had their permission to use the room at will, and that he often entered the room for various purposes" (342 U.S. at 50). In these circumstances, the defendant had an interest in the hotel room at the time of the search sufficient to support a reasonable expectation of privacy as to goods he left there.

In *Jones, supra*, this Court extended "standing" for Fourth Amendment purposes to those who were "legitimately *on* premises where a search occurs" (362 U.S. 267, emphasis added). Since then, this Court and others have properly broadened the doctrine to include those who, while having no property right in the premises searched and not being present when the search occurs, nevertheless have a right as invitees to occupancy of the premises at the time in question. See *Alderman* v. *United States*, 394 U.S. 165; *Baker* v. *United States*, 401 F. 2d 958, 981-984 (C.A. D.C.). This, of course, would include the defendant in *Jeffers*. Thus, as the Court explicitly pointed out in *Mancusi* v. *DeForte, supra*, 392 U.S. at 368, *Jeffers* can properly be read as conferring standing to suppress on the ground that the defendant had a sufficient "possessory interest in the premises" to object to the unlawful search of the hotel room. And see *Jones* v. *United States, supra*, 362 U.S. at 266.

To be sure, the government argued in *Jeffers* that, because the seized narcotic was contraband, the defendant had an insufficient property interest therein to give him standing. In rejecting that contention, the Court observed (342 U.S. at 52): "The search and seizure are * * * incapable of being untied." It then stated (342 U.S. at 53-54):

> We are of the opinion that Congress in abrogating property rights in such goods, merely intended to aid in their forfeiture and thereby prevent the spread of the traffic in drugs rather than to abolish the exclusionary rule formulated by

> the courts in furtherance of the high purposes of the Fourth Amendment. * * *
>
> Since the evidence illegally seized was contraband the [defendant] was not entitled to have it returned to him. It being his property, for purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial.

Such reasoning is, we think, questionable in light of the subsequent determination in *Jones*, *supra*, that a person who is "wrongfully" occupying or possessing real property "cannot invoke the privacy of the premises searched" (362 U.S. at 267). As noted earlier (*supra* pp. 25-26), this principle should have equal application to personal property; one whose possession of stolen goods or contraband is "wrongful" should similarly not be permitted to invoke a privacy in the personalty seized. He can reasonably expect that efforts will be made by the authorities to apprehend such goods to return them to their rightful possessor. Hence, so long as there is no intrusion on some legitimate expectation of privacy (*i.e.*, privacy of person, home or office) while property of this nature is recovered, no "standing" should attach by virtue of the fact of wrongful possession alone.[21]

To the extent that *Jeffers* suggests otherwise, we submit that its rationale should be abandoned. It is not supported by traditional notions of property law; and, more importantly, it is not supported by considerations of privacy stressed in the Court's more

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[21] But see n. 17, *supra*.

recent opinions. Indeed, this Court seemed to intimate such a conclusion in the margin of the plurality opinion in *Alderman* v. *United States*, *supra*, wherein rules were fashioned as to "standing" for Fourth Amendment purposes of persons overheard by electronic surveillance. There, the Court held, *inter alia*, that a homeowner had standing to suppress evidence of illegally overheard conversations occurring on his premises, even if he was not present and did not participate in the conversations. Responding to Mr. Justice Harlan and Mr. Justice Stewart, who were in partial dissent on this phase of the opinion, the plurality stated (394 U.S. at 177) that the homeowner could properly object to the use of such conversations against him, "not because he had any interest in the seized items as 'effects' protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment." The seizure of narcotics in the home was noted as an appropriate analog (394 U.S. at 177 n. 10):

> If the police enter a house pursuant to a valid warrant authorizing the seizure of specified gambling paraphernalia but discover illegal narcotics in the process of the search, the narcotics may be seized and introduced in evidence in the prosecution of the homeowner, whether the narcotics belong to him or to a third party. * * * But if the officers have neither a warrant nor the consent of the householder, it is elementary Fourth Amendment law that the narcotics are suppressible on his motion. * * * *The reason that*

> *the narcotics may be seized and introduced in evidence in the first case * * * but not in the second case where there was no warrant is not the simple reason suggested by Mr. Justice Harlan that the householder has a property interest in the narcotics and therefore has "standing" to object.* Rather, it is because in the first case there was no illegal invasion of the premises, while in the second the officer's entry and search violated the Fourth Amendment, the narcotics being the fruit of that illegality. (Emphasis added.)

It is this focus on the interest in privacy, rather than on the mere fact of possession, that we believe is the proper approach to the question of standing under the Fourth Amendment, notwithstanding certain language to the contrary in *Jeffers*.

b. Apparently, what worried the Court in *Jeffers* was the prospect of a substantial diminution in the deterrent impact of the exclusionary rule upon law enforcement officers if it did not recognize an interest in the seized contraband sufficient in itself to confer standing. We doubt that such an effect would have occurred; nor do we think that it will occur if the position we urge here is adopted. See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, *supra*, 403 U.S. at 415-418 (Burger, C.J., dissenting). The fact that stolen goods, if in the hands of a "wrongful" possessor, are themselves entitled to no special protection under the Fourth Amendment does not encourage law

enforcement officers to be any less circumspect in their intrusions on a person's legitimate expectation of privacy in order to recover such property. And, if the circumstances surrounding a search are such that the defendant's right to privacy was not infringed—as is our submission in the present case—there is no more reason to accord standing simply to augment the impact of the exclusionary rule than in circumstances where other evidence is seized from third parties that, under present law, clearly can be introduced against persons whose privacy has not been invaded. See *Alderman* v. *United States*, *supra*, 394 U.S. at 171-172, 175.[22] See also *Parman* v. *United States*, 399 F.2d 559, 564-565 (C.A.D.C.), certiorari denied, 393 U.S. 858; *Feguer* v. *United States*, 302 F.2d 214, 248-250 (C.A. 8), certiorari denied, 371 U.S. 872;[23] cf. *Klingler* v. *United States*, 409 F.

[22] In *Alderman*, the Court rejected an argument by the defendant that the rules of standing should be liberalized as a means of increasing the deterrent function of the exclusionary rule on the conduct of law enforcement officers (see, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206; *Linkletter* v. *Walker*, 381 U.S. 618, 636-637), indicating that it was "not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth" (*Alderman*, *supra*, 394 U.S. at 174-175). See also *Lego* v. *Twomey*, No. 70-5037, this Term, decided January 12, 1972, slip op., pp. 10-12.

[23] These cases rejected an argument that, in order to effectuate the deterrent function of the exclusionary rule, evidence seized by law enforcement authorities from abandoned premises should be suppressed where the agents did not know,

2d 299, 304-305 (C.A. 8), certiorari denied, 396 U.S. 859.

4. *The dual rationale of Jones.* There still remains the question whether the possessory charge in this case is alone reason to confer standing automatically so as (a) to avoid placing petitioner in a *Jones* "dilemma," and (b) to prevent the prosecution from benefitting from "inconsistent * * * positions." We think not. If our above analysis with respect to Fourth Amendment considerations is correct, neither rationale sustaining the automatic standing rule of *Jones* is relevant in the present situation, where possession relates only to stolen goods. Accordingly, to establish "standing," petitioner should be required to show that the seizure here took place under circumstances that amounted to an invasion of a legitimate expectation of privacy.

a. The "dilemma" that concerned the Court in *Jones*, should a defendant be required to establish standing, rests essentially on the argument, as indicated earlier (*supra*, pp. 12-13), that to vindicate his Fourth Amendment rights on a motion to suppress, the defendant might have virtually to admit his guilt of the offense charged. That "special problem". (362

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at the time of their search and seizure, that an abandonment had occurred, and the search would have been illegal but for that fact. Since the defendant's privacy had not been invaded, the courts found no occasion to exclude the evidence merely to attempt to deter a repetition of the same type of conduct by the agent. See also *Massachusetts* v. *Painten*, 389 U.S. 560, 564-565 (White, J., joined by Stewart and Harlan, J. J., dissenting from the dismissal of certiorari as improvidently granted).

U.S. at 261) was partially answered in *Jones* by relaxing the conventional standing requirements for possessory offenses.

Several years after *Jones*, however, this Court, in *Simmons* v. *United States*, 390 U.S. 377, provided a more complete response to the "dilemma" confronting defendants with Fourth Amendment claims. As observed earlier, the *Simmons* case involved the question of the use against a defendant at trial of testimony offered to establish his standing on a suppression motion. If the earlier testimony were available to the prosecution for later use, the Court noted, this might well deter some defendants "from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim" (390 U.S. at 392-393). And, as recently explained in *McGautha* v. *California*, 402 U.S. 183, 211-213, wherein the rationale of *Simmons* was reexamined, such a prospect of self-imposed restraint in this area could thus have the effect of "weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior." "This," the Court has since recognized (*McGautha* v. *California*, 402 U.S. at 211), "was surely an analytically sufficient basis" for the use-restriction rule that emerged in *Simmons*.[24]

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[24] The *Simmons* Court also sought to sustain its holding on the ground that a use-restriction rule was necessary to avoid the "intolerable" situation of a defendant being forced to choose between giving up "what he believed * * * to be a valid Fourth Amendment claim, or, in legal effect, to waive his Fifth Amendment privilege against self incrimination" at trial (390 U.S. at 394). But, in *McGautha* (402 U.S. at

While *Simmons* arose in the context of a prosecution for a non-possessory offense, the principle enunciated therein, that evidence given by a defendant in a suppression hearing may no longer be used against him at trial, has equal application here where the indictment charges a crime of possession.[25] Consequently, the *Jones* "dilemma" has essentially been removed by the subsequent use-restriction rule of *Simmons*.[26] Cf. *United States* v. *Price*, *supra*, 447 F. 2d at 29; *United States* v. *Cobb*, *supra*, 432 F.2d at 721-722. If, then, there is any vitality left to the

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212), this Court stated that the validity of such reasoning, "based on a 'tension' between constitutional rights and the policies behind them * * * must now be regarded as open to question." It did not, however, question the soundness of the result in *Simmons* (402 U.S. at 212).

[25] Of course, an abandonment of the automatic standing rule of *Jones* in favor of an extension of the *Simmons* use-restriction principle to persons charged with possessory offenses would not allow an affirmance of the decision below as to lack of standing in this case. Petitioner cannot be taxed with having had to anticipate such a modification of *Jones*, and so penalized for his failure to testify in support of his "standing" on the motion to suppress. Compare *Williams* v. *United States*, 401 U.S. 646. See pp. 40-41, *infra*.

[26] It is unclear whether the rule in *Simmons* is limited to the *direct* use at trial of the defendant's earlier testimony, or also bars the introduction of prior contradictory statements for purposes of impeachment. In *Harris* v. *New York*, 401 U.S. 222, this Court, in a different context, held that the use-restriction rule for in-custody statements under *Miranda* v. *Arizona*, 384 U.S. 436, did not preclude the prosecution from using such statements to impeach (401 U.S. 226). *Harris* was concerned with a use-restriction rule grounded on the policy of deterring unlawful police behavior during custodial inter-

dual rationale of the possessory aspect of *Jones*, it must be found in the alternative basis advanced for the automatic standing rule (362 U.S. at 263): *i.e.*, "to hold to the contrary, that is, to hold that [the

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rogation; and it was there determined (401 U.S. at 225) that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Simmons*, on the other hand, established a use-restriction rule, as we have pointed out, grounded on a different consideration, *i.e.*, so that defendants will not "be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim" (390 U.S. at 392-393). In this context, the question whether such deterrence is reduced enough by assuring a defendant that his prior testimony cannot be used against him at trial *directly* so that its use *indirectly* by the government for impeachment purposes can be permitted, is a difficult one that may not be settled by *Harris*. But it is not presented in this case.

We point out, however, that if the *Harris* holding can appropriately be extended to the use-restriction rule of *Simmons*, such a result would not, in our view, resurrect for the defendant the type of "dilemma" that concerned the Court in *Jones*. The prospect that earlier testimony might be used at trial solely for impeachment purposes is legitimate cause for concern only if the defendant intends to "use perjury by way of a defense" (*Harris* v. *New York*, *supra*, 401 U.S. at 226). His "dilemma," then, does not rest on the fact that, if he tells the truth at the suppression hearing, he virtually confesses his guilt of the possessory offense, which is what bothered the Court in *Jones*. It is, rather, that if he speaks truthfully on one occasion, he cannot make contradictory statements on the other. But, any time a person testifies under oath he is "under an obligation to speak truthfully and accurately" (*Harris* v. *New York*, *supra*, 401 U.S. 225). Accordingly, it would seem particularly inappropriate to relax the requirements for standing to suppress simply to "free [the defendant] from the risk of confrontation with prior inconsistent utterances" (*id.* at 226). But see n. 28, *infra*.

defendant's] failure to acknowledge interest in the [property] or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction."

b. But, as we understand the fundamental inquiry for purposes of establishing standing to suppress under the Fourth Amendment, this reasoning must also fail. For it does not follow that the government, in a prosecution involving a charge of possession of stolen property, would under our position have the benefit of "contradictory assertions of power" as noted in *Jones* (362 U.S. at 264).

Petitioner's conviction most certainly flows from proof of his knowing possession of the stolen whiskey before and at the time of the search. Yet, the admissibility into evidence of the fruits of that search, on the ground that petitioner lacked standing, is perfectly consistent, in our view, with the theory that the petitioner had constructive possession at all relevant times. In the absence of any intrusion upon the privacy of petitioner's own person, papers or effects, or upon private premises in which he has a sufficient Fourth Amendment interest, the evidence is admissible. And, if we are correct in our position that no such claim of privacy can be sustained on the basis of mere possession alone when that possession is knowingly wrongful, the possessory interest that is an essential element of proof for conviction is, for the government, irrelevant to the standing question on the

motion to suppress.[27] See *United States* v. *Lopez*, *supra*, 420 F.2d at 317. There is thus no inconsistency in the government's asserting before the jury on the issue of guilt that the defendant had possession of the seized property, while requiring the defendant, on a motion to suppress, to demonstrate that some legitimate expectation of privacy on his part was invaded by the search and seizure.[28]

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[27] Indeed, the only situation in which the possessory interest in stolen property might conceivably have any relevancy on a motion to suppress would be where, unlike the present case, the accused claimed that he was in possession but that his possession was innocent, in that he had no knowledge that the property was stolen. Assuming *arguendo* that such a claim, if satisfactorily demonstrated, would be sufficient to establish standing under the Fourth Amendment—which is by no means clear (see n. 17, *supra*)—it might then be necessary for the government to refute the claim of innocent possession before the evidence can be admitted. But, in so doing, the government would not be asserting a position inconsistent with, or contradictory to, its position at trial. Nor would the accused need to be concerned that in attempting to vindicate his Fourth Amendment rights on the basis of such a claim, he would have to admit to possession of the stolen property; that "dilemma" is resolved by the use-restriction rule of *Simmons*.

[28] However, if the *Harris* holding, permitting use at trial of a defendant's prior statements for purposes of impeachment, were recognized as an appropriate modification of the *Simmons* rule, we would not think that the defendant should be put to the task of establishing standing under the Fourth Amendment in circumstances where the theory of the government's case under the possessory charge acknowledges a clear invasion of privacy—*i.e.*, where the stolen goods have been seized on the person of the accused or were taken from his own premises. We say this because, if, as a practical matter, the defendant chooses not to vindicate his Fourth Amendment

In taking such a stand, the prosecution does not, as *Jones* suggested (362 U.S. at 263), subject petitioner "to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation." The "remedies" under the exclusionary rule depend upon some transgression of the constitutional right to individual privacy. They should not be afforded automatically to one charged with "lawless possession" when the sole basis for his claim is the seizure of stolen property in which he has no legitimate proprietary interest and with respect to which he can have no reasonable expectation of privacy under the Fourth Amendment. See *Alderman* v. *United States*, *supra*, 394 U.S. at 179 n. 11.

III. If the Court Agrees With Our Position on the Standing Issue, This Case Should Be Remanded For a Hearing

In the present case, there has been no testimony on the issue of standing before the district court, because the district judge ruled on the merits that the affidavit for the search warrant pursuant to which the stolen whiskey was seized was valid. In view of the government's concession to the contrary (both in the court below and here), it seems appropriate that the in-

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claim due to the risk of possible *limited* use at trial of his earlier testimony, the government would then have the benefit of inconsistent positions. That, of course, would not be so in the present case, however. Since here the government's theory under the possessory charge does not depend on any acknowledgement of an invasion of privacy, but is, indeed, consistent with the argument that no privacy rights of this petitioner were violated, petitioner should be required to establish "standing" under the Fourth Amendment.

stant case be remanded to the district court for a determination of the question whether petitioner was a victim of an invasion of privacy with respect to the seizure of the stolen whiskey.

Petitioner was admittedly not present at the time of the seizure in the shed on his father's farm. Resolution of the issue will therefore depend on whether, when the search occurred, petitioner had sufficient permission to be on the property so as to have a "possessory interest" therein (see *Mancusi* v. *DeForte, supra*, 392 U.S. at 367) (see p. 29, *supra*). Cf. *United States* v. *Jeffers*, 342 U.S. 48. Although certain testimony at the trial before the jury has a bearing on this question, the fact-finder has not yet had an opportunity to resolve the issue in terms of the principles relating to "standing" which we believe should govern this case.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the case remanded with directions to send it back to the district court for a hearing on the question of petitioner's "standing" in accordance with the principles previously enunciated.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

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